No. 170

IN THE

Supreme Court of the United States

HARRY HERMAN SLACKMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable,
The Supreme Court of the United States:

Now comes Harry Herman Slackman, hereinafter called petitioner and applies for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, to review a judgment entered in said cause on May 15, 1952, affirming a judgment against petitioner entered in the United States District Court for the Northern District of Texas, Dallas Division, on September 21, 1951, and in support thereof, respectfully represents:

STATEMENT OF THE CASE

Appellant was charged by Indictment in one court. It charged appellant was a civilian inspector and employee of a New York Quarter Master Procurement Agency, United States Army, and in such capacity asked, accepted and received $286.00 with intent to have influenced thereby his decision and action on a question, matter, cause and proceeding which was at that time pending before him in his official capacity. (Tr. 1-2).

The case was tried to a jury on his plea of not guilty. Petitioner was found guilty and sentenced to imprisonment for a period of three years and to pay a fine of $500.00. (Tr. 14-15)

The record of the testimony is voluminous, and a full statement thereof would unduly enlarge this Petition. The necessary and pertinent facts germane to the considerations presented herein are hereafter stated in connection with the discussion of the reasons relied upon for allowance of the Writ.

STATEMENT AS TO JURISDICTION

Jurisdiction is invoked under Section 1254, Title 28, U.S. C. A. The opinion of the Court of Appeals was filed on May 15, 1952. Petition for Rehearing was denied on June 2, 1952.

QUESTIONS PRESENTED

The opinion of the Court of Appeals was a Per Curiam opinion and only recited that "the judgment appealed

from is affirmed" and hence gave no discussion whatever as to the issues raised on appeal.

The Petitioner raised in the Court of Appeals three issues which he considered fundamental to a fair and impartial trial and are herein presented at the earnest insistence of the Petitioner that the Court of Appeals erred in affirming the judgment of the trial court because of:

1. The insufficiency of the evidence as to proof of venue as tested by his Motion for Judgment of Acquittal. (Point No. 2 in Brief in Court of Appeals).

2. The failure of the Court to properly instruct the jury on the law of the case. (Point No. 3 in Brief in Court of Appeals).

(a) Failure of Court to give Requested Charge No. 3-A.

(b) The Court committed reversible error in giving a charge on entrapment because same was equivocal, misleading and confusing.

(c) Failure of the Court to charge on the ingredients of the offense and the proof necessary to sustain the same.

3. The Court committed reversible error in admitting in evidence hearsay testimony, which was highly prejudicial to the rights of the appellant. (Point No. 4 in Brief in Court of Appeals).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. In the Per Curiam opinion of the Court of Appeals, Fifth Circuit, in the instant case, by ignoring the government's failure to prove venue, the Per Curiam opinion is in direct conflict with the decision of the Court of Appeals, Seventh Circuit, in *United States vs. Jones*, 174 Fed. (2) 746.

2. The Court of Appeals, Fifth Circuit, in its Per Curiam opinion, in the instant case, has so far departed from the accepted, and established standards for judicial proceedings, and has sanctioned such departure by the lower court as if to require and call forth this Court's power of supervision and revision to the end that uniformity of decision be obtained, and that the settled principles of judicial procedure, and safeguards long established as essential to a fair trial, be not broken down.

3. The refusal of the trial court to give Requested Charge No. 3-A was excepted to and was urged by petitioner on Appeal as reversible error. (TR-318 319). This is direct conflict with the decision of the Third Circuit, in the case of *United States vs. Frischling*, 160 Fed. (2) 370.

(a) The Court erred in giving the charge on entrapment, at the request of the government, because the same was equivocal, misleading and confusing, and is in direct conflict with the ruling of this court in *Bollenback vs. United States*, 326 US 607.

(b) The Court committed reversible error in its failure to instruct the jury on the law applicable to the case. The charge was oral (TR-313 to 317). Nowhere was the jury instructed as to what statute was involved nor was any statute read to the jury. Nowhere was the jury instructed as to what constituted the ingredients of the offense, nor what proof is required to sustain the charge. Failure of the Court to charge the jury on the law of the case was reversible error. Fundamental error which should have been noticed by the Court of Appeals.

4. The Court of Appeals in its Per Curiam opinion, in the instant case, departed from the accepted and established standard for judicial proceedings, in not reversing the jugment of the trial court because of the admission of prejudicial evidence which was violative of the hearsay rule. (Point No. 4 in Petitioners Brief in Court of Appeals).

A witness was permitted to testify in the court below that he gave a sign or signal to an FBI Agent, by cleaning his eye-glasses (TR-103-04) to convey a message to the FBI Agent that Appellant had received the money. (TR-108). An FBI Agent was permitted to testify that he "had allegations or had been told" that a crime had been committed. The admission of this testimony is in direct conflict with the holding in *Hermansky vs. Unted States* 7 Fed. (2) 458, by the Eighth Circuit. (Raised under Point 4 in Brief in Court of Appeals).

CONCLUSION

The Per Curiam opinion of the Court of Appeals, Fifth Circuit, does not specifically discuss matters herein assigned for the allowance of the Writ of Certiorari, though such points were raised and argued before it and fully presented in the record of the case accompanying this Petition. The effect of such opinion of the Court of Appeals is to sanction the rulings and action of the trial court in

(a) Refusing to sustain the Motion for Acquittal because VENUE was not proved.

(b) Failing to instruct the jury on the law of the case, and refusing to give Requested Charge No. 3-A, and in giving the charge on entrapment which was equivocal, misleading and confusing.

(c) In admitting hearsay testimony which was highly prejudicial, hereinabove set out, which rules and actions of the trial court, as heretofore asserted, are contrary to the principles of law and established judicial precedence applicable to the case as petitioner verily believes. On these grounds, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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SUPPORTING BRIEF

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UNITED STATES OF AMERICA, *Respondent*

SUPPORTING BRIEF

To the Honorable,
the Supreme Court of the United States:

REFERENCE TO OPINION OF THE CIRCUIT COURT OF APPEALS

The opinion of the Court of Appeals, 5th Circuit, in the appeal of *Harry Herman Slackman, Appellant, v. United States of America, Appellee,* on May 15, 1952, before Holmes, Strum and Rives, Circuit Judges, was a per curiam opinion and reads as follows:

"The judgment appealed from is affirmed."

JURISDICTIONAL STATEMENT

Jurisdiction is invoked under Sec. 1254, Title 28, U.S. C. A. The opinion of the Court of Appeals, 5th Circuit, was filed on May 15, 1952. Petition for Rehearing was by the Court of Appeals, denied on June 2, 1952, no opinion other than stated above being rendered in connection therewith.

STATEMENT OF THE CASE

The statement made in the Petition for Writ of Certiorari, in support of which this brief is presented, as a part of the Statement of the Case, is here adopted and is not restated to avoid repetition. Hereafter, in the Argument such further facts will be stated as may be pertinent to the issues under consideration.

SPECIFICATIONS OF ERROR

(1) The Court of Appeals, 5th Circuit, erred in affirming the judgment of the trial court because the trial Judge denied appellant's Motion for Judgment of Acquittal, because venue was not proven.

(2) The Court of Appeals, 5th Circuit, erred in affirming the judgment of the trial court because it failed to instruct the jury on the law of the case.

(a) The trial court committed reversible error in refusing requested charge No. 3 A, and by the inter-

polation of such charge in his general instructions to the jury.

(b) The court committed reversible error in giving a charge on entrapment, at request of the government, because the same was equivocal, misleading and confusing.

(c) The court committed reversible error because the court failed to instruct the jury on the law applicable to the case, and left the jury in ignorance as to what statute the prosecution was brought under, and what proof was necessary to sustain the charge.

(3) The Court of Appeals, 5th Circuit, erred in affirming the judgment of the trial court because the trial court admitted, over petitioner's objection, hearsay testimony which was highly prejudicial.

ARGUMENT

(1) At the time the government rested its case, Appellant filed a Motion for Acquittal. It was renewed at the close of all the evidence and should have been granted for two reasons; First: The government totally failed to prove venue

Second: The evidence was so highly controversial and inadequate to justify or authorize a conviction; and it is insufficient to support a verdict of guilty.

We will address ourselves to the first reason set forth. Appellant's Motion for Acquittal took the place of a mo-

tion for a directed verdict, according to Rule 29 Federal Rules of Criminal Procedure. It raised the question as to the sufficiency of the evidence to support the verdict of a jury or the finding of the court. One of the things the government has the burden of proving is venue. It is an essential part of the government's case. No one testified on the issue of Appellant "asking, accepting and receiving" the money, except J. Roland Cassidy. His testimony begins on page 82 of the record. Nowhere does he testify that he gave the money to appellant in the Dallas Division of the Northern District of Texas. Nowhere does he testify that appellant accepted or received the money in the said Division or District. The record is silent on proof of venue. Nowhere does the government even pretend to offer proof thereof.

In *United States vs. Jones*, 174 Fed. (2) 746, decided June 9, 1949 by the Seventh Circuit, in an opinion by Judge Minton now Associate Justice of the Supreme Court, that Court said:

> "We think the motion for acquittal made at the conclusion of all the evidence properly raised the question of venue in the court below. It is a challenge to the Government in the presence of the court that the Government has failed in its proof. The motion is not required by the rules to be in writing or to specify the grounds therefor. That in itself would indicate that the defendant is not required to go over the proof for the benefit of the Government or the court, in the absence of some request for more specific objection.

We do not know what kind of a motion "for discharge" was made. No written motion was set forth in the record. We assume that the motion was oral and was summarily overruled by the court, and the Government was satisfied with the record. The Government has a duty to perform. First, it must prove its case on the record and that includes the proof of venue. Second, if that proof is challenged as to sufficiency by a General Motion for Acquittal, it is the government's duty to require the defendant to be specific in his objection, and a failure to do so will not enable the government on appeal to say that the question was not specifically raised below. If it was not, that was the government's fault. Surely, the defendant does not have to lead the government through the various steps of the trial to insure a proper record for the government to stand upon. The Government cannot be heard to say it does not know the signifiance of a Motion for Acquittal. It follows that if there was a failure in the proof of venue by the Government, such failure required an acquittal, and the Court should have sustained the defendant's motion. The judgment of the District is reversed."

It is therefore earnestly urged that the trial court fell into reversible error in overruling Appellant's Motion for Acquittal.

For the second reason urged why his Motion for Acquittal should have been sustained Appellant says that the evidence was insufficient and inadequate to justify, authorize or suport a conviction.

Where the issue is drawn and outlined as between Cassidy, who had lost $30,000.00 under the government con-

tract, on the one hand, and the Appellant, a government inspector on the other, both being involved in the alleged violation, according to the government's theory, it would be error for the court to refuse to require corroboration of Cassidy. In this case Cassidy blames Slackman, while Slackman blames Cassidy. Under such a situation the Court ought to require corroboration. Especially is this true when the record shows that 70 people were in the plant when the inspection was made which is alleged to have been influenced by a bribe, and none of them saw the money passed between the alleged bribe giver and the alleged bribe taker. And a more potent reason for corrobroation is that neither of the four FBI Agents saw any money passed, nor did any of the people in the cafe witness the alleged transaction. In this entire record there is no corroborating testimony that Appellant accepted or received any money to influence him in his duties. There is no proof that the pants inspected and passed by appellant was not passed on their merits. There is no proof that the pants passed were inferior or not in accordance with the contract. Ferguson does not corroborate Cassidy because he is in the same category. He is an accomplice like Cassidy. He aided and abetted in the commission of the crime, according to the government's theory, so one accomplice cannot corroborate another.

Section 2, Title 18, USCA provides:

> "Whoever commits an offense against the United States, or aides, abets, counsels, commands, induces or procures its commission, is a principal."

The above statute robs the testimony of Cassidy and Ferguson of its character as "substantial evidence". This is true whether they be real or feigned accomplices, because their status as witnesses was fixed and undisputed. The testimony of the FBI Agents, who searched Appellant, without a warrant, and found money on his person do not corroborate Cassidy. They didn't see any money passed. They never heard Cassidy and Petitioner talking about a bribe or money. They don't know whether it was bribe money or whether it was slipped in appellants pocket. They do say that Petitioner was surprised when they found it. Even though it was the same money Cassidy had procured from the bank; even though he had taken the numbers down it could have been slipped into appellants pocket. The inference could be either way, so that such testimony is as much corroboration of appellant as it is of Cassidy. It was the same money that Cassidy got at the bank to use as evidence in this case. The money itself could have corroborated Cassidy if it had contained the finger prints of the appellant, but the FBI Agents, for some reason, did not process the money for any prints. To say that the finding of the money on the person of Petitioner corroborates Cassidy's story that he gave it to him as a bribe, reminds the writer of the story of the old hunter who was careless with the truth and in exaggerating his prowess as a hunter, he asserted that he had killed 200 jack rabbits with one shot, and then to corroborate his weird story, produced 200 such rabbits as his

evidence. He actually proved he had 200 rabbits but it fell short in proving he had killed all of them with one shot.

It is deep rooted in American Jurisprudence that the testimony of accomplices is not of the most satisfactory character. Such considerations go to the credibility of the evidence, and it is a safe and sound rule that requires such testimony to be closely scrutinized and accepted with caution. Indeed, it has long been the custom in the United States, for a federal judge not only to caution the jury as to the danger of acting upon the unsupported testimony of an accomplice, but to advise them not to convict in the absence of some corroborating evidence. Or where there is a total lack of such corroboration to take the case from the jury. This rule does not mean that the jury may not believe the testimony of an accomplice or that they cannot find a verdict of guilty upon it alone. To the contrary they may so convict if they believe such testimony, after being properly guided and advised, unless the testimony appears on its face to be held perjury, preposterous or self-contradictory.

We insist that Cassidy's contradictory statements that he did not bribe appellant; that he gave the money to him but not corruptly, leaves the record in such a state that the court should have sustained Appellants Motion for Acquittal because of its insufficiency and inadequacy.

Wharton Criminal Laws, Vol. 2 11th Ed. page 1240;

United States vs. Balsalmas, 177 F. (2) 485;

West vs. United States, 113 F. (2) 140.

Petitioner renewed his Motion for Acquittal at the close of all of the testimony and it was again overruled. It became the duty of the court to consider all of the evidence when he overruled the motion the second time. The record was in such a state that there was no substantial evidence of appellant's guilt, beyond a reasonable doubt the Court committed reversible error in overruling said Motion.

(2) The court failed to adequatedly charge the jury on the law of the case. Under this point will be discussed the inadequacy of the charge of the court in the following alphabetical subheads:

(A) The Court committed reversible error in refusing Requested Charge No. 3-A and by the "interpolation" of such charge in his general instructions to the jury.

(B) The Court committed reversible error in giving a charge on entrapment, at the request of the government, because same was misleading and confusing.

(C) The trial judge failed to instruct the jury on the law. He nowhere instructed the jury what constituted the elements of the offense nor what proof was required to sustain the charge. The oral charge of the court left the jury in ignorance as to the law applicable to the case.

A. Petitioner made and filed his Requested Charge No. 3-A as shown in the record at page 10. The court

marked it "Given" but did not give it in the exact words, but did touch on the subject, as is shown by his charge on page 317 of the record, where he said:

> "Then again, on the subject of reputation of witnesses, you are entitled to listen to each and take into consideration how well the people know him, and if evidence has, or may have established a reputation of good character, you may take that into consideration, with the other evidence, and if all of the evidence combined creates a reasonable doubt in your mind, you will acquit the defendant."

While we recognize the rule that the trial court is not impelled to charge the jury in the exact words requested by the defendant, yet when his attention is called to the necessity of a charge and the court undertakes to "interpolate" it is incumbent upon him to cover the subject matter. The above does not cover the subject matter requested by Appellant in his Requested Charge 3-A. He wanted the jury instructed as to the effect of the proof of his reputation and was not concerned with the reputation of the witnesses, as given by the Court. The Court misleads the jury by telling them that they are entitled to listen to each (witness) and take into consideration how well the people know him (witness), and if the evidence has, or may have established a reputation of good character (whose reputation the witness's?) you may take that into consideration, with the other evidence, and if all of the evidence combined creates a reasonable doubt in your mind, you acquit the defendant.

The Petitioner was entitled to have the substance of his requested charge given to the jury.

In *United States vs. Frischling*, 160 F. (2) 370, by the Third Circuit, Judge Maris wrote:

> "It has long been the rule that it is the duty of the trial judge to instruct the jury in substance that reputation of the defendant's good character, when put in evidence, is a fact which they should consider with the other facts in the case and which, when so considered, may like other facts, generate a reasonable doubt which would justify acquittal."

After citing *Edington vs. United States*, 164 US 361, *Cohen vs. United States*, 282 Fed. 871 and *Quick vs. United States*, 128 Fed. (2) 832 Judge Maris continued:

> "It will be seen that while in this case the trial judge did instruct the jury that they were to consider the defendant's reputation for good character with the other facts in the case he failed, although specifically requested to do so, to give them any guidance as to what part that fact could play in their consideration of the defendant's guilt. In this we think he erred. A jury who were not told that the defendant's reputation for good character when considered in the light of the other evidence might be permitted to raise the sort of doubt in their minds which would justify acquittal, might well regard evidence of such reputation as wholly irrelevant to the specific issue of guilt committed to them and consequently give it no consideration whatever. We accordingly cannot say that the failure of the trial judge to give the requested charge did not substantially prejudice the defendant. The case is reversed and remanded."

Under the above authority error was committed in the trial court's failure to give the requested charge instead of the confusing and misleading statement which he did give with reference to the reputation of the WITNESSES, and we emphasize the plural character of the word Witnesses.

In *Sunderland vs. United States*, 19 F. (2) 202, this rule is stated as requiring an instruction setting forth (1) the purpose and function of such evidence, viz, to generate reasonable doubt; (2) The probative status of such evidence, viz, that it is entitled to be considered whether the other evidence be clear or doubtful; and (3) the possible effect of such evidence, viz, that when it is considered, with the other evidence, if reasonable doubt is generated as to defendant's guilt, he is entitled to an acquittal.

In *Michelson vs. United States*, 335 US 469, although the case was affirmed the Supreme Court, speaking through Associate Justice Jackson, has this to say with reference to testimony of good character or reputation, to-wit:

> "He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this court has held that such testimony ALONE, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed."

No one except Cassidy, who under the government's theory, participated in the commission of the crime by giving the bribe, gave any testimony that any money was passed. No one saw it. No one heard it, although 70 people were present during the inspection. Four FBI Agents were in the vicinity but not one saw or heard the money passed. The passing of the money was a highly controversial issue of fact. On one hand Cassidy, who had lost $30,000.00 under the Government Contract gave affirmative testimony on that point. He later amended his testimony, on cross-examination by saying the money wasn't given corruptly, and that he didn't at any time decide to bribe appellant. (Tr-114)

So in this state of the record Petitioner urges that he was substantially injured by the court's failure to give his requested charge No. 3-A or a similar instruction embracing the substance thereof. That the Court's failure to do so, in effect, tipped the scales against Petitioner. One of them was telling the truth as to whether it was a bribe or whether it was surreptitiously slipped into his pocket. If the jury had been given the charge, so that they could have been guided as to its import, the scales would not have been so tipped but would have remained on an even keel in keeping with the canons of law and justice.

In *Miller vs. United States*, 120 F. (2) 968 the Court held:

> "Even though the trial court was not bound to instruct on character testimony in the absence of a re-

quest for such instruction, when it did proceed to instruct the jury on character testimony, it was required to give a correct instruction."

In *Marcus vs. United States*, 166 F. (2) 497 a case involving the acceptance of a bribe by one acting for and on behalf of the United States, the Court reversed the case because the Court did not give a proper charge on alibi. Defendant had requested a charge on alibi but the court ruled it was defective. The court of Appeals said. 'Even if defendant requested charge on alibi was defective, it was court's duty to itself compose and give a proper instruction upon the subject.' This was on the theory that the defendant had called the matter to the attention of the court by his defective requested charge. We insist that Petitioner's requested charge No. 3-A made it incumbent on the court to give it or an appropriate charge on the subject matter contained therein.

For the error pointed out Petitioner earnestly prays that the writ be granted.

(b) The court committed reversible error in giving the charge on entrapment. It was confusing and misleading.

During the trial of the case various objections were made to some of the testimony because it suggested entrapment or bordered closely to that classification. However, it was not the contention of Petitioner that he was entrapped into accepting or receiving a bribe. He denied vehemently that he had done so, and testified that the

money found on him by the FBI Agents, when they searched him without a warrant, had been slipped into his pocket by government witness J. Roland Cassidy. That the money was on his person without his knowledge or consent.

No request was made by Petitioner for the court to charge on the law of entrapment. In fact the court stated that entrapment was a matter of law. But the government counsel, Honorable Frank Potter, requested the court for such a charge, as shown on page 318 of the record.

It is the contention of Petitioner that the court in giving such charge misled and confused the jury instead of instructing them on the law of the case. In fact it was not a legal and proper charge on the law of entrapment. It injured the Petitioner as much, if not more, however, than it would have had the charge been an adequate and full charge on the subject.

Although the issue formed by the evidence was simple, in that, the appellant either did accept a bribe or else the money was slipped into his pocket surreptitiously, the court gave such a charge. Of course it was helpful to the government because it, when given, in effect, told the jury that Petitioner's defense was something else than what the evidence raised. It said that, in effect, the court thought Petitioner had accepted the bribe but if you think the officers induced him to do so he cannot be convicted. The charge is in direct conflict with other portions of his instructions.

As we understand the rule a charge is not erroneous if in its entirety it correctly states the law. This is true even though one paragraph, standing along, does not state the law. But if there are two instructions in the charge which are in direct conflict and one of them is clearly prejudicial then the charge is erroneous and constitutes reversible error.

Rule 52 Federal Rules of Criminal Procedure requires a reversal where the trial court gives two instructions one of which is erroneous and prejudicial and the other is correct.

In order that this court may comprehend the confusing atmosphere under which the charge under attack was made it is well to observe the instructions of the court, during the progress of the trial, on the admissibility of some of the evidence.

On page 113 of the record:

> "The Court: Gentlemen, both of you sit down, and whether or not it is entrapment is a question of law. You ask him what took place, and the court will submit the matter of entrapment. Don't ask him to pass on it."

This ruling or instruction took place, of course, in the presence of the jury.

On page 147 of the record:

> "The Court: Whether or not it is entrapment is a question of evidence, so, the Court will not rule at this time. At this time I overrule the objection."

No wonder the jury was confused and misled in the instructions. These two rulings or pronouncements of the trial court are repugnant to each other. On one page the matter of entrapment was a matter of law, while on the other page it was a matter of evidence.

The courts charge, like his rulings, had two significations. One was as shown on page 317 of the record, and which presented the defensive theory of the defendant, that the money was placed in his pocket, without his knowledge and consent, by the witness Cassidy, for the purpose of having the defendant searched and arrested, so as to reflect upon him and the Inspection Service, etc. The other, under the entrapment charge which in effect told the jury that it was permissible for the officers of the law, if they have reason to believe that the law is being broken, to have someone to use as a decoy to lead the suspected victim into a test as to whether he will, or is, violating the law, but if that is so done as to lead an innocent man to do something that he would not have done but for the manner in which it is so applied, the government would be guilty of entrapment.

It is most unusual that the government would take the position that they were prosecuting a man for accepting a bribe, in which they insisted that he accepted such a bribe, and then raise the question of whether they, themselves, entrapped him into doing so. Or as the Court says "lead the suspected victim into a test to see whether he will or is, violating the law". Then the Court goes on to

tell the jury, "but if that is so done as to lead an innocent man to do something that he would not have done but for the manner in which it is so applied, the government would be guilty of entrapment".

It can readily be seen that it was an equivocal charge. In *United States vs. Donnelly*, 179 F. (2) 227 the Court held:

> "We are of the opinion that the court erred in its instructions to the jury. Where two instructions are given, one erroneous and prejudicial, and the other correct, since it is impossible to tell which one the jury followed, it constitutes reversible error."

Then, in *Bollenback vs. United States*, 326 US 607, the Supreme Court, speaking thru Justice Frankfurther, said:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. That a charge to the jury in a criminal case should not be misleading."

And then the opinion of Justice Frankfurter continued:

> "In a trial by jury in the federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. The influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue, the error is not cured by a prior unexceptional and unilluminating abstract charge.

> In view of the government's insistence that there is abundant evidence to indicate that Bollenback was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

Petitioner earnestly urges that the error committed by the giving of the misleading and confusing charge on entrapment was prejudicial to his rights. That he was deprived of a fair and impartial trial in that the court did not charge the jury on the law of the case. That the sting of such error was more aggravated when considered in the light of the equivocal rulings in respect to the issue, as shown on pages 113 and 147 of the record. That the error calls for a reversal of the case and Petitioner prays the court to grant the writ of certiorari and review this case.

(c) The trial judge failed to instruct the jury on the law of the case. His charge was oral (TR-313 to 317) and nowhere was the jury instructed as to the law applicable to the case they were trying. They were not instructed as to the ingredients of the offense nor what proof was necessary to sustain the charge.

Judges must explain the law to the jury. They must separate the rule of law from the question of fact. This produces both precision in the statement of the rules, and a clear outside judgment on the facts. This was not done.

The definition of the offense was not given nor was the statute read to the jury. No explanation of the law was given the jurors. They were left to conjecture as to what constituted the offense charged. The judge, at no time, stated any proposition of law. He only stated the law's application. As pointed out by this Court in *Screws vs. United States*, 325 US 91, such a charge is erroneous.

In *Morris vs. United States*, 156 Fed. (2) 525, the Ninth Circuit, Judge Stephens said:

> "Thus, at an early stage in legal history we find the judge duty bound in his position to give instructions on the law to the jury. He was privileged to suggest or give examples as to law. The law might be applied, but this after or in conjunction with the offense had been defined to the jury: It remained the duty and privilege of the jury to apply the law".

In the instant case the trial court did not define the offense nor did he give the jury any instructions as to the law. How could the jury know what law they applying the facts to? Then Judge Stephens continues:

> "The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged. The jury must not be reduced to the position of a mere ministerial agent by a direction on their very thought, thereby withholding a vital right due them. And the judge may not pass judgment on the ability of a jury to correctly act in any given situation and in his discretion limit their historic province. The jury is in no sense the agent of the judge. They both derive their

origin from the same high source, and the judge in laying down rules to guide the jury in their deliberations, merely acts as the mouth piece of the law for the purpose of making out a definite and clearly ascertained path by which the ends of justice are attained."

It is self-evident that the jury must have the law given to it in order that it can perform its function.

In *Campbell vs. United States*, 167 Fed. (2) 451, the Fifth Circuit, thru the late Judge Lee reversed a conviction on the grounds urged here and in doing so said: That the trial court, who merely read the statute to the jury without explaining it or stating what proof was necessary under it, failed to discharge his duty in instructing the jury. In Petitioner's cases the judge did not even read the statute to the jury nor did he explain any statute to them.

Petitioner says that the failure of the trial court to instruct the jury on the law of the case cost him a fair and impartial trial. That the error is fundamental in nature and should be noticed by the reviewing court. Otherwise, American Jurisprudence, in the National Court, has broken down, and that type of fair trial guaranteed to all has been denied. Why have a jury trial if the jury is not be to advised on propositions of law?

(3) The witness Cassidy was permitted to testify that he and the witness Ferguson had a conversation, out of the presence of the defendant. (Tr. 87, 88, 89) The hearsay rule was evaded by the court in permitting Cassidy to

testify that later he and Ferguson "Recounted a conversation" that they previously had. In other words, Cassidy was permitted to testify in effect that Ferguson told him what appellant and Ferguson had talked about.

The witness Cassidy was permitted to testify that he had a conversation with FBI Agent Merit which conversation took place out of the presence of defendant (Tr. 90, 91). The witness Cassidy was permitted to testify that he had a conversation with the FBI Agents out of the presence of the defendant and made plans and arrangements for signals to be given and that Cassidy did give a signal or sign to the FBI Agent by cleaning his eye glasses (Tr. 103, 104); that by cleaning his eye glasses the said Cassidy conveyed a message to the FBI Agents which was that appellant had received the money. (Tr. 108). The witness Harlam Brown, another FBI Agent, was permitted to testify that he had a conversation with the witness Cassidy, out of the presence of the defendant. (Tr. 140-3-5) That such witness had prearranged with Cassidy as to where the FBI Agents would be and that Cassidy had told him that after the inspection by the inspector was usually carried to the next manufacturer. (Tr. 148).

Circumvention of the hearsay rule as above shown constitutes reversible error. In *Harmansky vs. United States*, 7 F. (2) 458 the Court said "Asked why certain agents were sent to defendants' place to see if liquor could be bought, the witness answered, 'he had many complaints of bootlegging up there'. This was rank hearsay and in

competent. It was error when objected to and calls for reversal in the instant case. The FBI Agents were permitted to tell of conversations they had with Cassidy, and also with Mr. Frank Potter, the U. S. Attorney prior to the alleged offense. They were permitted to tell the jury that the FBI Agents "had *received allegations* that a crime had already been committed." What is the difference, insofar as the hearsay rule is concerned, whether they had "allegations" or "had been told" that crime had been committed? This is rank hearsay and was highly prejudicial to the defendant's rights.

In *Ellis vs. United States*, 138 F. (2) 612, was a case where two men were convicted for transporting girls in interstate commerce for immoral purposes and conspiracy to commit such offense. The two girls, an FBI Agents, Asst. U.S. Atty. and the father of one of the girls went to Reelfoot Lake and located and identified the cabin in which the two girls stated that they and the defendants once tarrie illicitly. Over the objection of the defendant, two witnesses, including one of the girls, narrated this identification with minor variations; and the Court held that in whatever form it was or could have shown, the evidence was purest hearsay, incompetent to any fact discussed between the girls and the authorities, and was reversible error.

Mattison vs. United States, 7 F. (2) 458 was reversed because prejudicial hearsay evidence was introduced. The

Court reversed *McAdams vs. United States*, 74 F. (2) 37 for the same reason.

Appellant says that the error became more aggravated when the court, instead of curbing the flow of hearsay testimony, stated, as shown on page 155 of the record, as follows:

> "The Court: Well, gentlemen, I may not catch the point, but I don't see much to quibbling over it. If there is a pending problem, an impending storm, or impending crime, the fact that people may have made preparation to investigate it, I don't see anything out of the ordinary about it."

And at another point on the same page when the Court said:

> "The Court: If you heard somebody had threatened your life, or was going to kill you, and you told it to the officers, as a matter of protection, to apprehend the criminal in advance, that would necessarily be entrapment."

Petitioner contends that in permitting the FBI Agents to testify at the trial as to confidential information on which they acted in searching the appellant's person was error. He is supported in this contention by the Court in *Enrique Rivera vs. United States*, 57 F. (2) 816, wherein the trial court permitted government inspectors to testify as to confidential information on which they acted in searching a truck.

An officer may testify before the jury that acting upon information, he did certain things, but he may not go

further and testify as to precisely what he was told about the particular place or the particular person. When the FBI Agents were permitted to testify that they had been told that a crime had been committed, the hearsay rule was violated. The Agents dressed it up and glamorized it so that its hearsay character was hardly recognized when they said "they had allegations of a crime already having been committed (Tr. 156-158)."

CONCLUSION

For all of the grounds and reasons heretofore stated, Petitioner said that his Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit, to review the judgment of said court in affirming the judgment against Petitioner entered in the United States District Court for the Northern District of Texas, Dallas Division, is well supported in law and in fact and ought to be allowed and granted and the case reviewed.

Respectfully submitted,

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